Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

NIKOLAY SENCHENKO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Lacey Act, 16 U.S.C. § 3371, *et seq.*, forbids trafficking in illegally taken wildlife. The Act defines certain crimes, which are misdemeanors or felonies depending upon the market value of the wildlife taken for sale. The Act twice states plainly that "each violation [of the Act] shall be a separate offense." Did the Ninth Circuit, wherein most Lacey Act prosecutions are brought because of the considerable hunting and fishing resources located within its jurisdiction, err when it held that misdemeanor violations of the Act could, if committed over two years as part of a "single continuing scheme", be aggregated into a single prosecution and conviction for a felony, even though Congress specifically prescribed a contrary "unit of prosecution" in the Act and even though the Ninth Circuit disregarded binding precedent to reach its decision?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	3
Reasons for Granting the Writ	6
I. Summary	6
II. The Ninth Circuit Erroneously Failed To Follow The Unambiguous Requirements Of The Statute.	7
III. The Ninth Circuit's Decision To Disregard The Statute Was In Conflict With Several Of This Court's Decisions.	10
A. Congress' Will Prevails.	10
B. Absent an Expression of Congressional Intent, the Rule of *Uno Actu* and the Doctrine of Lenity Prevail.	11

Contents

	Page
C. Unambiguous Statutes Raise No Occasion for Judicial Construction.	12
IV. The Ninth Circuit's Opinion Upsets A Balance Carefully Achieved By Congress.	13
V. The Ninth Circuit's Opinion Is The Only Authoritative Decision On The Point, And Is Binding In The Nine Western States Where Most Lacey Act Prosecutions Come From.	14
VI. The Ninth Circuit's Opinion, If Permitted To Stand, Could Throw Settled Law Into Doubt.	16
Conclusion	17

TABLE OF CITATIONS

Cases Cited:

Bell v. United States, 349 U.S. 81 (1955) 10, 11, 12

Blockburger v. United States, 284 U.S. 299 (1932) ... 11, 12

Ebeling v. Morgan, 237 U.S. 625 (1915) 11

Ex Parte Snow, 120 U.S. 274 (1887) 11

Lexecon v. Milberg Weiss, __ U.S. __, 118 S. Ct. 956 (1998) 13

Contents

Page

Schaffer v. United States, 362 U.S. 511 (1960) 8

United States v. Jinadu, 98 F.3d 239 (6th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1455 (1997) .. 9

United States v. Seaman, 18 F.3d 649 (9th Cir. 1994) 5

United States v. Shabani, 513 U.S. 10 (1994) 12, 13

United States v. Smith, 499 U.S. 160 (1991) 13

United States v. Tutino, 883 F.2d 1125 (2d Cir. 1989) 8, 9

Statutes Cited:

16 U.S.C. § 3371, *et seq.* ..... i, 1

16 U.S.C. § 3373(1)(B) 7

16 U.S.C. § 3373(2) 7

18 U.S.C. § 2311 8

18 U.S.C. § 2314 8

28 U.S.C. § 1254(1) 1

Contents

Page

Other Authorities Cited:

Hearing Before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, United States Senate, 97th Cong. 1st Sess. on S. 736, A Bill to Provide for the Control of Illegally Taken Fish and Wildlife, April 1, 1981, Serial No. 97-H8 ..... 9, 10

S. Rep. No. 97-123 (1981) *reprinted in* 1981 U.S.C.C.A.N. 1748 9

United States Sentencing Commission Guidelines Manual, § A(4)(f) 16

Wharton's Criminal Law (11th Ed.) 12

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Decided January 8, 1998 ..... 1a

Appendix B — Excerpts Of Transcript Of Proceedings Dated April 16 And 17, 1996 ..... 12a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed April 28, 1998 ..... 15a

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was published at 133 F.3d 1153 (9th Cir. 1998), and is reprinted verbatim at Appendix A. The district court did not write an opinion; excerpts of the trial transcript reflecting the district court's ruling are reprinted at Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its opinion on January 8, 1998; Petitioner's timely petition for rehearing was denied on April 28, 1998. (Appendix C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), and this Petition for a Writ of Certiorari is timely if filed on or before July 25, 1998.

STATUTORY PROVISION INVOLVED

This case involves the proper interpretation of the Lacey Act, 16 U.S.C. § 3371, *et seq.* The statute provides, in relevant part, as follows:

> Prohibited Acts
>
> It is unlawful for any person —
>
> (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
>
> * * *

Penalties and Sanctions

(1) Any person who —

* * *

(B) violates any provision of this chapter . . . by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350, knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter . . . and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

STATEMENT OF THE CASE

Petitioner Nikolay Senchenko ("Senchenko") was indicted on October 12, 1995. The indictment alleged that:

> On or about between September 30, 1993 and September 29, 1995 ... NIKOLAY V. SENCHENKO did knowing engage in conduct involving an intent to sell wildlife with a market value in excess of $350, to wit: bear, by transporting said wildlife knowing that it was taken in violation of [law] ...

Indictment, October 12, 1995, at p. 1.

Senchenko was tried between April 2, 1996 and April 19, 1996, in the Eastern District of Washington. The evidence in the case showed that on separate occasions over a period of years Senchenko had taken up to four American black bears. The possible values of the bears were expressed in dollar ranges given for parts of the animals. The commercially attractive parts of a single bear were said to range from less than $250 in total to varying amounts over the statute's prescribed level of $350. There was no evidence that Senchenko took or transported more than one bear on any single occasion.

Senchenko argued in the district court that "the government has to prove at least one act of transportation of parts having a value of $350, and that there is no aggregation available to the government." Transcript, April 15, 1996, p. 1184. The government, while making no formal concession, did not appear to disagree: "We have to prove only one transportation of parts that were of greater value than $350." *Id.* p. 1187.

At the charging conference, Senchenko requested (both in writing and orally) that the district court clearly instruct the

jury that it could not convict unless it found that Senchenko had transported bear parts on a single occasion having a value of at least $350. Senchenko objected that the district court's instruction number 2 was unclear on the point.

> There is ambiguity in the instructions as to whether or not they can string together disparate acts of transportation or disparate acts of poaching . . . to come up with the $350 value, and it would be our request that the instructions clearly reflect [that a] single act of transportation has to be connected to a value of not less than $350.

Id. pp. 1262-63.

The district court did not disagree as to the legal standard urged by Senchenko, commenting that "I believe the law requires a single act necessarily must be the basis for showing the violation of the indictment as charged." The district court stated it believed, however, that its proposed instruction number 2 was "an accurate statement of the law." *Id.* Instruction number 2, as given by the court, did not address the point. It stated, in a paraphrase of the indictment:

> The indictment alleges that between approximately September 30, 1993 and September 29, 1995, the defendant did knowingly engage in conduct involving an intent to sell wildlife with a market value in excess of $350, to wit, bear, by transporting said wildlife, knowing it was taken in violation of federal law.

Id. p. 1274.

The district court declined to change the instruction. Senchenko was convicted of a felony violation of the Act, and

was sentenced to three months' imprisonment (however, he remains enlarged on his own recognizance pending disposition of this petition for certiorari).

Senchenko appealed to the United States Court of Appeals for the Ninth Circuit. He argued that his conviction should be vacated because the government did not in fact prove a single act of transportation involving bear parts worth more than $350, and the jury was not properly instructed that it must find value greater than $350 associated with a single act of transportation.[1]

The Ninth Circuit did not disagree that the district court's Instruction Number 2 had not adequately conveyed the point. The Ninth Circuit declared that failure immaterial, however, because it disagreed with the district court as to whether a number of misdemeanor violations of the Lacey Act might be aggregated to make up a felony offense. Without referring to the contrary language of the statute, the Ninth Circuit ruled that the Lacey Act permits the values of animal parts taken in a series of misdemeanor offenses of the Act to be aggregated so as to meet the threshold to constitute a felony. The Ninth Circuit therefore sustained Senchenko's conviction.[2]

---

1. Senchenko asked for alternative relief of either a new trial with proper instructions, or entry of an outright acquittal (based on Circuit precedent holding that where the government fails either to prove a predicate value to sustain a felony offense or to offer a lesser-included misdemeanor instruction, a defendant must be acquitted. *United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994)).

2. The Ninth Circuit also rejected Senchenko's argument that the government was required to prove that Senchenko "transported" animal parts. The Ninth Circuit held that any act involving "conduct that that involves . . . the intent to sell . . . wildlife" would satisfy the Lacey Act. The Ninth Circuit simply overlooked the fact that Senchenko had been charged specifically with transporting bear parts, and no other conduct. Indictment, p. 1.

The Ninth Circuit's decision was erroneous. Senchenko respectfully asks that this Court grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

I.

SUMMARY

This Court should grant certiorari to reverse the Ninth Circuit's judgment because it is wrong and because the Ninth Circuit's erroneous published opinion is of great public significance.

The Ninth Circuit's decision was wrong because the Ninth Circuit ignored the plain requirements of the statute that "[e]ach violation shall be a separate offense"; and because in so ruling, the Ninth Circuit put itself in squarely in conflict with this Court's precedents holding that it is for Congress to prescribe the "unit of prosecution" which the courts must employ; and more generally, that the courts are obliged not use legislative history to "construe" statutes whose language and requirements are perfectly plain into a contrary meaning.

The case is important because Congress' explicit requirement limiting prosecutions for hunting violations to misdemeanors except in cases involving discrete offenses with wildlife valued at over $350 has been completely undone; and the Ninth Circuit's holding is the only published appellate opinion dealing with the question presented. It is binding in the nine western states where most of the Lacey Act prosecutions are brought. Permitting the Ninth Circuit's decision to stand may erroneously be taken by other courts as a signal that this Court's precedents governing Congress' right to prescribe "units of prosecution" are moribund and need not be applied in other criminal contexts.

II.

THE NINTH CIRCUIT ERRONEOUSLY FAILED TO FOLLOW THE UNAMBIGUOUS REQUIREMENTS OF THE STATUTE.

The Ninth Circuit held that a series of "closely-related" acts in violation of the Lacey Act may be aggregated to make up a felony offense.[3] But nothing in the statute so provides. The express language of the statute is exactly to the contrary. The Lacey Act dictates *twice* (once each in the felony[4] and misdemeanor[5] penalty provisions) that:

> *Each violation shall be a separate offense* and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

16 U.S.C. § 3373(1)(B) and § 3373(2) (emphasis added). It is difficult to imagine any language Congress might have used that would have made the rule any more clear.

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3. In substituting its "closely-related acts" aggregation test for the statute's explicit requirement that each violation shall be a separate offense, the Ninth Circuit did not explain how lower courts are to measure whether acts are "closely related" so as to justify aggregation. Nor did the Ninth Circuit explain how the killing of four bears over a period of two years would qualify as "closely related" events. The Circuit said merely that Senchenko had three bear gall bladders in his possession, and that these "had 'enough relationship' to be charged as a single offense." 133 F.3d at p. 1157.

4. 16 U.S.C. § 3373(1)(B).

5. 16 U.S.C. § 3373(2).

The Ninth Circuit did not quote, mention or in any way explain away the contrary language of the statute. It simply ignored it.[6] Instead, the Ninth Circuit relied by analogy upon *Schaffer v. United States*, 362 U.S. 511 (1960), *United States v. Tutino*, 883 F.2d 1125 (2d Cir. 1989), and selected legislative history from the Senate's consideration of the 1981 amendments to the Lacey Act.

Schaffer did not involve the Lacey Act. It involved 18 U.S.C. § 2314, covering stolen property. That statute, unlike the Lacey Act, specifically authorized the government to aggregate the values of stolen property in a single indictment.[7] The Ninth Circuit was aware of this essential distinction in the provisions of the statutes, but dismissed the difference as merely

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6. The Ninth Circuit was aware of the statutory command. Senchenko cited it to the court in his opening and reply briefs, at oral argument, and in support of his request for rehearing.

7. The *Schaffer* Court noted in footnote 2 to its opinion that "18 U.S.C. § 2314, 18 U.S.C.A. § 2314, provides in relevant part:

> " 'Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * * 'Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.'

"18 U.S.C. § 2311, 18 U.S.C.A. § 2311, provides so far as material here:

> " 'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.' "

Schaffer, supra, 362 U.S. 511 at 512 n.2.

"somewhat different statutory language." *Id.* 133 F.3d at p. 1157.

Tutino also did not involve the Lacey Act. *Tutino* involved aggregation of amounts of heroin conveyed in separate sales to a total above the amount which triggered a ten-year minimum mandatory sentence. However, *all* heroin sales are felonies, no matter what the amounts, and the provisions in the narcotics act referring to quantities are thus merely sentencing provisions and *not* elements of the offense which must be charged and proved. *United States v. Jinadu*, 98 F.3d 239 (6th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1455 (1997). *Tutino* is thus completely inapposite in Lacey Act cases, where the government's proof must establish a value to differentiate between misdemeanor and felony offenses.

The Ninth Circuit had no warrant, of course, to turn to the legislative history of the 1981 Lacey Act amendments, where the text of those amendments is clear and unambiguous.[8] But the legislative history it did rely on could not be said to have furnished any grounds upon which to ignore the statute's clear command. The legislative history upon which the Ninth Circuit relied consisted of language from a Senate Report which demonstrates that Congress was concerned to punish large-scale commercial dealers in illegally taken wildlife (and parts thereof). S. Rep. No. 97-123 (1981) *reprinted in* 1981 U.S.C.C.A.N. 1748. The Ninth Circuit overlooked other legislative history, however, which demonstrates equally clearly that Congress deliberately preserved the misdemeanor provision to prevent abusive prosecutions where the value of wildlife taken was below $350. *See id.*; *Hearing Before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works*, United States Senate, 97th Cong. 1st Sess. on S.

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8. We address this point more thoroughly at paragraph 3(c), *infra*.

736, A Bill to Provide for the Control of Illegally Taken Fish and Wildlife, April 1, 1981, Serial No. 97-H8.[9]

As a result, the Ninth Circuit has not only failed to follow the statute as written, but has declared it to mean the exact opposite of what it says. That was error.

III.

THE NINTH CIRCUIT'S DECISION TO DISREGARD THE STATUTE WAS IN CONFLICT WITH SEVERAL OF THIS COURT'S DECISIONS.

A. Congress' Will Prevails.

This Court has clearly held that when Congress has decided upon the appropriate "unit of prosecution," its decision is to be followed by the federal courts. In *Bell v. United States*, 349 U.S. 81 (1955), a Mann Act case, Justice Frankfurter wrote:

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9. "Mr. Santarelli: Very simply said, Mr. Chairman, if you are going to make a man a felon, you either put him on significant notice he is going to be a felon by requiring of him that he either knowingly and wilfully violated the statute, or you tailor a statute very narrowly to make felons out of only those very large scale operators . . .

Senator Chafee. Mr. Santarelli, the points you raise were the very points that greatly disturbed Senator McClure, and as a result we had extensive discussions with Senator McClure in which we thus arrived at a $350 cutoff. That satisfied Senator McClure . . ."

Hearing Before the Subcommittee on Environmental Pollution, *supra*, April 1, 1981 at p. 18. Senator McClure was from the State of Idaho, a popular hunting destination within the Ninth Circuit.

> The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. * * * When Congress has the will it has no difficulty in expressing it — when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit.

Id. 349 U.S. at p. 83.

In the instant case, Congress has given a clear expression of its will. "Each violation shall be a separate offense . . .". The Ninth Circuit should have ended its inquiry with the language of the statute, and followed it. In failing to do so it contravened both the statute and binding precedent from this Court.

B. Absent an Expression of Congressional Intent, the Rule of *Uno Actu* and the Doctrine of Lenity Prevail.

Even if the Congress had not specified the proper "unit of prosecution" in Lacey Act cases, the result reached by the Ninth Circuit would still have been wrong because it contradicts other precedent from this Court. In *Blockburger v. United States*, 284 U.S. 299 (1932) the Court exhaustively examined the precedents governing aggregation of offenses, and clearly laid down the rule that (absent some specific contrary Congressional command) crimes defined as prohibiting distinct acts (those completed "*uno actu*") are to be charged severally, but where crimes are defined as prohibiting the pursuit of certain activity, only one prosecution will lie. The Court compared *Ex Parte Snow*, 120 U.S. 274 (1887), where the offense of unlawful cohabitation was inherently continuing, with *Ebeling v. Morgan*, 237 U.S. 625 (1915), where, although several acts of cutting mailbags were

done pursuant to a common scheme, Congress clearly defined the crime in terms of the discrete acts, thus, multiple charges were appropriate. The Court quoted with approval from Wharton's Criminal Law (11th Ed.):

> The distinction stated by Mr. Wharton is that, "when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." [Citation omitted] . . . "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. * * * If the latter, there can be but one penalty."

Id. 284 U.S. p. 302.

In addition, this Court has held that if Congress has left room for doubt as to its intentions in the matter of how to punish a series of offenses, the doctrine of lenity requires a federal court to make the determination in favor of the defendant. *Bell v. United States, supra.*

In the instant case, the Ninth Circuit had no scope for its decision, as Congress had declared its will. But even if it had not, the law required that the Ninth Circuit should have ruled in favor of Senchenko, and its decision was error.

C. Unambiguous Statutes Raise No Occasion for Judicial Construction.

Finally, the Ninth Circuit ran afoul of this Court's precedent establishing that a court should not construe statutes when they are plain on their face. *United States v. Shabani,* 513 U.S. 10

(1994); *United States v. Smith*, 499 U.S. 160 (1991). There is nothing ambiguous about the phrase "[e]ach violation shall be a separate offense". Since the word "shall" connotes a mandatory obligation, *Lexecon v. Milberg Weiss*, __ U.S. __, 118 S. Ct. 956 (1998), there was no discretionary room for the Ninth Circuit's exercise in statutory construction.

IV.

THE NINTH CIRCUIT'S OPINION UPSETS A BALANCE CAREFULLY ACHIEVED BY CONGRESS.

When a court disregards the language of a statute, it necessarily fails to give deference to choices made by the legislative branch in enacting the statute. Where, as here, a court creates a "judicial gloss" which not only ignores the statute but directly contradicts it, the court interferes egregiously with the legislative process. When the Ninth Circuit decided that the Lacey Act, which says "[e]ach violation shall be a separate offense," really meant that several violations could be a combined into a greater single offense, it frustrated a balance carefully achieved by Congress.

Prior to the 1981 amendments to the Lacey Act, any violation was a misdemeanor. It is true, as the Ninth Circuit noted from the legislative history, that Congress wanted to strengthen the statute to deter large-scale commercial violators. One option available to Congress was simply to change the penalty for any and all violations from a misdemeanor to a felony. But at least one Western senator objected that this posed unnecessary risks that minor hunting violations would lead to felony arrests and prosecutions.[10] Congress therefore adopted amendments which explicitly recognized that not all violations should be felonies; that some minor violations should remain

10. *See* note 9, *supra*.

misdemeanors. Importantly, Congress also included language ("[e]ach violation shall be a separate offense") whose effect was to deprive prosecutors of the power to string together minor offenses to create a basis for a felony prosecution.

It is clear from the legislative history that the compromises which preserved the misdemeanor classification of offenses involving wildlife having a value of less than $350 were critical to the passage of the 1981 amendments. The Ninth Circuit has now undone that carefully-struck balance. In consequence, the Ninth Circuit has raised the possibility that a hunter who commits two misdemeanors, may, in the discretion of a prosecutor, be arrested, charged and convicted of a felony. That was *exactly* the possibility that Congress sought to avoid.

V.

THE NINTH CIRCUIT'S OPINION IS THE ONLY AUTHORITATIVE DECISION ON THE POINT, AND IS BINDING IN THE NINE WESTERN STATES WHERE MOST LACEY ACT PROSECUTIONS COME FROM.

The Ninth Circuit's holding is the only published appellate opinion from any circuit to deal with the question of aggregation of offenses under the Lacey Act. While in other circumstances this Court might prefer to wait and see whether a conflict develops among the Ninth and other circuits, there are two strong reasons not to wait in this case.

The first is that the Ninth Circuit's decision is so obviously contrary to the plain language of the statute. This is not a situation involving an ambiguous statute as to which, given time, different Circuits might develop different solutions which could be helpful to this Court when it decided to review the matter. There is no ambiguity to resolve, just a refusal to apply

the statute as written. No light is likely to be shed on the issue by waiting. If anything, delaying review of the Ninth Circuit's decision, and leaving it in place as the sole authoritative appellate application the Lacey Act to a series of minor offenses, could promote confusion and instability in a heretofore settled area of the law (*See* paragraph 6, *infra*).

The second reason is that the Ninth Circuit's opinion is precedent binding upon the district courts of the nine western states that contain the largest areas of ocean and undeveloped, uncultivated land in the country, where hunting and fishing are popular and common pastimes, and where, in consequence, the great majority of Lacey Act prosecutions are brought. A cursory review of the cases cited in the annotations to the Lacey Act in the United States Code Annotated reveals that more than half the reported cases involving criminal prosecutions under the Lacey Act originated in the Ninth Circuit. Among the cases published after the adoption of the 1981 amendments (that is, disregarding the pre-1981 cases), approximately three fifths originated in the Ninth Circuit.[11] In practical effect, that means that the odds of a conflict developing out of another Circuit are low, and that the law is now fully (and erroneously) settled in the majority of the places in this country where it really matters. The millions of hunters and anglers in the nine states of the Ninth Circuit are now exposed to a risk of felony prosecution for *de minimis* offenses, a result Congress explicitly intended to prevent.

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11. That is not at all surprising, given the immense wild land areas available for hunting within the states of Alaska, Montana, Idaho, Washington, Oregon, California, Nevada and Arizona, and the enormous ocean areas available as fishing grounds in the states of Alaska, Washington, Oregon, California and Hawaii, and the Territories of Guam and the Northern Marianas. All of these are within the Ninth Circuit.

VI.

THE NINTH CIRCUIT'S OPINION, IF PERMITTED TO STAND, COULD THROW SETTLED LAW INTO DOUBT.

There are crimes without number in the federal statute books and regulations.[12] Many of these pose often-difficult questions about "units of prosecution" and aggregation. Until now, the rules were clear: the courts were to follow Congress' directions, if any were given. Absent such directions, the courts were to examine the nature of the offense. Offenses continuing in nature were permitted to be charged as one crime; offenses discrete in nature were to be separately charged (all subject to a rule of lenity requiring, in close cases, adoption of the approach most favorable to the accused). The Ninth Circuit's published opinion, of course, defied all of those rules. If the Ninth Circuit's opinion remains on the books, it may serve as an invitation to other courts to indulge in the same process the Ninth Circuit did of deciding, according to their own received wisdom and not according to Congressional command or established principles, what result to reach. Should this Court decline to accept review of the Ninth Circuit's decision, its denial of *certiorari* may be taken as a signal that the Court is open to experimentation with what were, until now, settled rules. This Court should grant certiorari, and reverse, to forestall any such possibility.

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12. The United States Sentencing Commission, charged with the task of establishing guidelines for all federal crimes, threw up its hands when faced with "regulatory offenses".

> [T]he Commission found it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation.

United States Sentencing Commission Guidelines Manual, § A(4)(f).

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CONCLUSION

Nikolay Senchenko respectfully asks that the Court grant certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit on the question presented, and, having done so, reverse that court's judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED JANUARY 8, 1998

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nikolay SENCHENKO, Defendant-Appellant.

No. 96-30241.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 8, 1997.

Decided Jan. 8, 1998.

* * *

Leslie R. Weatherhead, Spokane, Washington, for defendant-appellant.

Timothy J. Ohms, Spokane, Washington, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Washington; Fred L. Van Sickle, District Judge, Presiding. D.C. No. CR-95-00228-FVS.

Appendix A

Before: WRIGHT and SCHROEDER, Circuit Judges, and SCHWARZER,* Senior District Judge

SCHWARZER, Senior District Judge:

Senchenko was charged in a one-count indictment with violation of 16 U.S.C. §§ 3372(a)(1) and 3373(d)(1)(B) for having "knowingly engage[d] in conduct involving an intent to sell wildlife with a market value in excess of $350, . . . by transporting said wildlife knowing it was taken in violation of United States law or regulation." The jury found Senchenko guilty and the district court denied his motion for acquittal. We have jurisdiction of his appeal under 28 U.S.C. § 1291, and we affirm.

FACTS

During the two year period alleged in the indictment, between September 1993 and September 1995, government agents found or were directed to four illegal bear snares in Colville National Forest, Washington.

On October 17, 1994, a hunter reported seeing a bear carcass hanging from a snare cable. When officers examined the snare site on October 23, they found the carcass had been cut down, moved under some bushes and "harvested"; someone had removed the bear's front claws, skull and gall bladder. On September 15, 1995, wildlife officials revisited the site and found the snare had recently been reset. While returning to the main road nearest the snare site, the officers encountered a hunter about to drive away from the snare trail in a silver Isuzu Trooper;

* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

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the hunter was later identified as Senchenko. From a check on the car's license plate, the agents learned the car was registered to Senchenko's son Gregory and found the family's address.

The officers tripped the snare, placed sensors along the path leading to it, and established a watch on the road closest to the snare site. On September 28, 1995, the officers observed a man park a silver Isuzu Trooper on the road near the head of the path. The path sensors were set off in sequence, and an officer watched a man reset the snare and walk back up the path. The sensor nearest to the road sounded some minutes later, after which the officers saw Senchenko emerge from the trail and approach the vehicle. At that point Senchenko was arrested, and the officer at the snare identified him as the man he had seen reset the trap mechanism.

Wildlife officers discovered three more snares in September 1993, September 1995, and November 1995. Based on similarities in design and construction, the government attributed all three to Senchenko. Federal agents obtained a search warrant for Senchenko's house and car on September 28, 1995. In the silver Isuzu Trooper they found rancid bear fat, a half-rotten pelt and nineteen black bear claws. Among the evidence found at the house were three dried bear gall bladders in Senchenko's briefcase, equipment needed to build snares, two bear pelts, a few teeth and more claws. In addition, officers found evidence that Senchenko had recently ordered 500 feet of steel wire cable.

DISCUSSION

The Lacey Act makes it a federal offense "to transport . . . any wildlife . . . taken in violation of any law, treaty, or regulation of the United States." 16 U.S.C. § 3372(a)(1). A

person who violates § 3372(a)(1) commits a felony "by knowingly engaging in conduct that involves . . . the intent to sell . . . wildlife . . . with a market value in excess of $350." 16 U.S.C. § 3373(d)(1)(B). Senchenko was charged with violating 36 C.F.R. Part 261, which prohibits hunting or trapping any kind of wild animal in the National Forest System "to the extent Federal or State law is violated." 36 C.F.R. § 261.8(a) (1995). Snaring bears is prohibited by Washington state law, which allows big game to be hunted only with a firearm, bow and arrow, or by falconry. Wash. Admin.Code § 232-12-047.

In reviewing the denial of a motion for judgment of acquittal, we must determine whether, viewing the facts in the light most favorable to the judgment, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Castaneda*, 16 F.3d 1504, 1510-11 (9th Cir.1994).

A. *Intent to Sell*

Senchenko argues that there was no evidence that he ever sold or intended to sell bear parts. The government's evidence-four existing snares and the equipment Senchenko owned to make more-was sufficient to link Senchenko to snaring on a commercial scale. A bear caught in a snare attributable to Senchenko was harvested only for commercially valuable parts, consistent with the parts found in his possession. Senchenko's wife testified that when he hunted bears for the family, he would bring the meat home as well as the commercially valuable parts, but no bear meat was found among the fifty-plus packages of game tested by the government. The government showed that the amount of bear gall bladders possessed by Senchenko exceeded his family's personal needs. This was sufficient to permit the jury to infer commercial intent.

Senchenko argues that he was prejudiced by the government's drawing an analogy, during its closing argument, to possession of large quantities of narcotics, inviting the jury to infer from the volume of bear parts that they were intended for sale. Senchenko also claims the analogy led the jury to think of him as a drug dealer. Because Senchenko timely objected, the standard of review is harmless error. *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir.1994), *cert. denied*, 513 U.S. 1100, 115 S.Ct. 773, 130 L.Ed.2d 669 (1995).

When reviewing prosecutorial comments made during closing argument for harmless error, we must determine whether the comments, considered in the context of the entire trial, affected the jury's ability to judge the evidence fairly. *United States v. de Cruz*, 82 F.3d 856, 862 (9th Cir.1996). We find that they did not. The prosecutor compared Senchenko's possession of a large number of bear parts to narcotics only during closing argument, not during the presentation of evidence. *See Abromson v. American Pac. Corp.*, 114 F.3d 898, 903 (9th Cir.1997) (citing cases giving greater latitude in closing arguments and finding harmless error). Immediately after introducing the analogy, the prosecutor told the jury "the defendant is not involved in drugs," and the judge properly instructed the jury that closing arguments are not evidence. Even if permitting the analogy to be offered was error, it was harmless. The analogy was not used as a substitute for proof: Senchenko's wife had already testified the family had used two gall bladders since November 1989, and may have been consuming a third when Senchenko was arrested. Relying solely on her testimony, a reasonable jury could decide that the three gall bladders in Senchenko's briefcase exceeded an amount intended for personal use.

Appendix A

B. *Proof of Conduct Involving Intent to Sell Bear Parts Valued in Excess of $350*

1. Statutory Interpretation

Senchenko contends that under the statute the government must prove "a single act of transportation" and that it improperly aggregated the value of bear parts found in Senchenko's car and house to arrive at the requisite value of $350. He does not contend that no transportation was involved; the evidence of bear parts found in his car in the vicinity of the bear traps, and for that matter in his house, permitted the jury to infer that transportation had occurred.

Senchenko reads more into the statute than its text warrants. The statute makes it a felony to "knowingly engag[e] in conduct that involves . . . the intent to sell . . . wildlife . . . with a market value in excess of $350." 16 U.S.C. § 3373(d)(1)(B). Transporting is merely one of several types of conduct-in addition to selling, receiving, acquiring and purchasing-banned by the act. As the statute makes clear, the focus is on conduct that involves commercial activity. The Senate report explained that the purpose behind the creation of a felony offense was to punish "unlawful commercial activity involving items valued at more than $350." S.Rep. No. 97-123, 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1750, and that the offense is made out by proof of the defendant's knowledge of the wildlife's illegal nature and "proof of commercial activity or intent, and proof of the fact that the [wildlife] had a market value in excess of $350." S.Rep. No. 97-123 at 11- 12; 1981 U.S.C.C.A.N. at 1758-59.

This is not a case in which the government aggregated distinctly separate acts or transactions to meet the jurisdictional minimum; indeed, the evidence does not reflect such separate acts or transaction. To the contrary, Senchenko's conduct of setting snares, harvesting trapped bears and taking the parts to his house comprises a series of acts forming "a single continuing scheme." *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir.1989) (aggregating heroin sales in single count). *See also Schaffer v. United States*, 362 U.S. 511, 517, 80 S.Ct. 945, 948-49, 4 L.Ed.2d 921 (1960), where the Court said that "[a] sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense their value may be aggregated." Although stated with reference to somewhat different statutory language,[1] the rationale is applicable here. Congress intended to punish conduct constituting commercial activity involving parts valued in excess of $350. Where the acts forming that conduct are closely related, the total value of the parts involved is properly taken into account. Here three dried gall bladders found in Senchenko's briefcase, which presumably had to be transported to the house, and which weighed six, eight and eleven grams apiece, placing their cumulative value at $625 to $750, had "enough relationship" to be charged as a single offense.

2. Evidence of Value

Senchenko contends that the government's expert witness was not competent to establish market values of bear parts in Eastern

1. *Schaffer* arose under a statute prohibiting the interstate transportation of stolen securities valued at more than $5,000. The statute defined "value" as the "aggregate value of all . . . securities . . . referred to in a single indictment." *See* 18 U.S.C. § 2311. 362 U.S. at 512, 80 S.Ct. at 946. The statute did not define, however, what acts of interstate transportation of securities could be aggregated within a single indictment.

Washington. The expert witness, Washington State Wildlife officer Harold Holste, had been a state wildlife officer for twenty-four years and had been investigating illegal sales of wildlife for seven. Under Fed.R.Evid. 702, he was qualified by experience and training to testify. *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir.1997). While Senchenko's argument may go to the weight of Holste's testimony, it does not undermine its admissibility. *United States v. Fleishman*, 684 F.2d 1329, 1336 (9th Cir.1982) (noting that defense's argument relates to the weight accorded to the expert testimony, not its admissibility under Rule 702). Admitting Holste's testimony of market values was not error.

Senchenko also argues that Holste's testimony should be disregarded because it was irrelevant. Another government expert, Joanne Shafer, testified that the medicinal use of the gall bladders derives from the bile salts they contain, and that in her experience the product was often marketed as bile salt rather than gall bladder. Thus, Senchenko argues, Holste's testimony regarding market values of gall bladders was superfluous and prejudicial. Sufficient evidence existed, however, to establish the sale of gall bladders themselves, and Holste's testimony clearly related to the price of the organ.

Finally Senchenko attacks the valuation of the seized parts. *Citing United States v. Seaman*, 18 F.3d 649 (9th Cir.1994), he contends that the government improperly used the value of the finished goods, i.e. the dried gall bladders, rather than the value of the raw materials, i.e. the wet gall bladders, at the time they were initially taken by him. In Seaman, the court overturned the defendants' convictions under 18 U.S.C. § 1361 because the government improperly used the valuation of finished goods (firewood that had been chopped, packaged and

seasoned) rather than the valuation of the goods taken from government property (felled trees) to meet the requisite jurisdictional amount. *Id.* at 651. *Seaman* stands for the proposition that the government cannot consider value added in establishing the jurisdictional amount. The present case is distinguishable from Seaman; here, Senchenko did not process the wet gall bladders but merely permitted them to dry. There is sufficient evidence of the value of the unprocessed bear parts, from $625 to $750, to sustain the verdict.

C. *Federal Jurisdiction*

Senchenko contends that the indictment should have been dismissed for failing to charge a federal offense. He contends that the underlying regulation which he is charged with having violated, 36 C.F.R. § 261.8, is unconstitutional under Article I, vesting all legislative powers in the Congress, because it allows the violation of state law to become the basis of a federal offense. The argument is without merit, having been rejected by the courts of appeals applying the Lacey Act. *See United States v. Lee*, 937 F.2d 1388, 1393-94 (9th Cir.1991) (incorporation of foreign law in Lacey Act is constitutional); *United States v. Bryant*, 716 F.2d 1091, 1094-95 (6th Cir.1983) (incorporation of state law in Lacey Act is constitutional).

D. *Probable Cause to Search Senchenko's House and Car*

Senchenko contends that the evidence seized in his home and car should have been suppressed because the warrant was issued on an affidavit that incorrectly stated that Senchenko was arrested while resetting the snare, while in reality he had been arrested at the top of the trail some distance from the snare. Senchenko argues that, had the court "set to one side" the false statement, probable cause would disappear.

The district court, after holding a Franks hearing, found that the errors were not made "deliberately or recklessly." We uphold this finding unless clearly erroneous. *United States v. Dozier*, 844 F.2d 701, 705 (9th Cir.1988). The threshold determination in a Franks hearing is whether erroneous statements or omissions in an affidavit supporting a search warrant were made "knowingly and intentionally, or with reckless disregard for the truth." *Franks*, 438 U.S. at 155, 98 S.Ct. at 2676. If such a finding is made, the court then determines whether "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." *Id.* at 156, 98 S.Ct. at 2676.

There was no clear error; the court considered the testifying officers to be "candid and forthright." The court was satisfied that the affidavit of federal agent Roger Parker reflected his understanding of Senchenko's arrest. The court therefore found that the affiant lacked the "high degree of awareness of probable falsity" that a finding of recklessness would require. Because the challenged statements or omissions were neither knowingly nor recklessly false, the motion was properly denied and no further inquiry into materiality was necessary. *See, e.g., United States v. Warren*, 42 F.3d 647, 653 (D.C.Cir.1994) (finding a misstatement to be immaterial and therefore not reaching the mental state issue).

E. *Admission of Prejudicial Testimony*

Senchenko's final argument is that the district court erred in permitting the government to ask his wife on cross-examination about his lack of employment. He timely objected to the testimony at trial, and we review the evidentiary ruling for abuse of discretion. *United States v. Mende*, 43 F.3d 1298, 1301-02 (9th Cir.1995).

Appendix A

The inquiry into Senchenko's employment status was relevant to support an inference that Senchenko had a commercial intent to sell bear parts. Thus, the district court did not abuse its discretion in permitting testimony that the defendant was unemployed.

The judgment is affirmed.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED APRIL 16 AND 17, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

APRIL 16 & 17, 1996
SPOKANE, WA.
95CR-228-FVSW

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

NIKOLAY V. SENCHENKO,

DEFENDANT.

VOLUMES 9 & 10 PAGES (1196 - 1373)
EXCERPT OF PROCEEDINGS
JURY TRIAL

BEFORE THE HONORABLE FRED L. VAN SICKLE,
JUDGE, AND JURY.

APPEARANCES:

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Appendix B

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* * *

[1262] * * *

MR. WEATHERHEAD:

* * *

Then finally, Your Honor, the instruction, I guess it is 7, 8, and also the Instruction Number 2, don't clarify for the jury what their duty is in connection with treatment of or findings concerning a specific event. There is ambiguity in the instructions as to whether or not they can string together disparate [1263] acts of transportation or disparate acts of poaching, if you will, for want of a better term, to come up with $350 value, and it would be our request that the instructions clearly reflect the single act of transportation has to be connected to a value of not less than $350. Thank you, Your Honor.

THE COURT: Yes. I would indicate that, counsel, I believe the instructions address the and are accurate statement of the law. The Lacey Act is not without its problems in terms of trying to interpret that act in written form, instructions and other aspects

of the law, as it relates to the indictment, and I do believe Instruction 2, they are an accurate statement of the law and meet the requirements of showing that transportation of interstate commerce. I'm mindful there are cases in the United States Supreme Court that have indicated that in other areas, but not at this point that I'm aware of.

THE COURT: I believe that those cases are read to apply to all circumstances. I believe that the reasonable doubt instruction accurately states the law and allows the parties to argue, each argue their theory of the case, and I believe the law requires a single act necessarily must be the basis for showing the violation of the indictment as charged.

[1274] * * *

Instruction 2. The indictment alleges that between approximately September 30, 1993, and September 29, 1995, the defendant did knowingly engage in conduct involving an intent to sell wildlife with a market value in excess of $350, to wit, bear, by transporting said wildlife, knowing it was taken in violation of federal law.

* * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 28, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-30241

D.C. No. CR-95-00228-FVS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NIKOLAY SENCHENKO,

Defendant-Appellant.

ORDER

Before: WRIGHT and SCHROEDER, Circuit Judges, and SCHWARZER,* Senior District Judge.

The petition for rehearing is DENIED.

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.